RECENT CASES

ACCORD AND SATISFACTION—PART PERFORMANCE—In Schwartzfager v. Pittsburgh Ry., 238 Pa. 158 (1913), the plaintiff, who had been injured by defendant, executed a release of all claims arising from that injury in return for payment of his expenses and wages during his enforced idleness. The defendant paid his expenses, but failed to pay him his wages. The plaintiff tendered the money received and sued for damages. His recovery in the lower court was sustained on the ground that an accord and satisfaction is not a bar to a recovery on the original action whether there has been a failure of consideration in whole or in part. The consideration in the accord and satisfaction was said to be in this case the payment of the expenses and wages and not the mere promise to pay.

This case simply applies the well settled rule that an accord and satisfaction is not complete until there has been full performance. 3 Blackstone's Com. 15; Peytoo's case, 9 Coke 79; Hearn v. Kiehl, 38 Pa. 147 (1861). Part performance is not sufficient; Memphis v. Brown, 20 Wall. 289 (U. S., 1873), nor is part performance with a tender of the residue. Noe v. Christie, 51 N. Y. 270 (1873); Kromer v. Heim, 75 N. Y. 574 (1879). So where the defendant has refused to complete the performance of the release there is all the more reason for holding it no bar to recovery in the original action. Saeger v. Runk, 148 Pa. 77 (1892).

These cases where performance alone is the consideration for the release, and when the agreement is purely executory, should be distinguished from those cases when the release is made in consideration of a mere promise to perform. In the latter the agreements are binding from the date of their execution and operate as a complete bar to the original action. Hosler v. Hursh, 151 Pa. 147 (1892); Laughhead v. Coke Co., 209 Pa. 368 (1904); Fields v. Aldrick, 162 Mass. 587 (1895); Cartwright v. Cook, 3 Barn. and Ad. 701 (1832). Action should be brought on the new agreement: Billings v. Vanderbeck, 23 Barb. 546 (N. Y., 1857). The intention to accept the promise in satisfaction may appear expressly or by implication. Morehouse v. The Bank, 98 N. Y. 503 (1885). Although it has been held that the intention must be expressly declared. Brunswick etc. R. R. v. Clem, 80 Ga. 534 (1888). In Evan v. Powis, 1 Exch. 601 (1847), it was left to the jury whether the plaintiff agreed to accept the agreement itself, which was oral, or the performance, as a satisfaction of the debt. When there were two notes it was left to the jury to determine whether the one was given in satisfaction of the other. Hart v. Boller, 15 Sarg. & Rawle 162 (Pa., 1826). Where the agreement is in writing the court ascertains what the intention was. Fields v. Aldrick, 162 Mass. 587 (1895).

ATTORNEY AND CLIENT—CONTINGENT FEES—SETTLEMENT OF SUIT—In a cause of action arising out of criminal conversation, the plaintiff employed an attorney upon an agreement to pay him a percentage of the damages recovered and not to settle the suit without the attorney's consent. After complaint had been served, the plaintiff did settle with the defendant. In a proceeding by the attorney to have judgment by default entered against the defendant for the amount of damages claimed by plaintiff, it was held that the agreement not to settle the suit was void as against public policy and that the cause of action, being for personal injury, was unassignable and that consequently the attorney had acquired no legal or equitable interest therein by virtue of the agreement which was not barred by the settlement. Howard v. Ward, 139 N. W. Rep. 771 (S. D., 1913).

In England a barrister cannot enter into any valid agreement with a client. Kennedy v. Brown, 13 C. B. (N. S.) 676 (1863); 11 Am. Law Reg. 357. See

also Mooney v. Lloyd, 5 S. and R. 411 (Pa., 1819). Agreements for the payment of fees conditioned upon the success of the suit have been regarded as champertous and therefore void in England, Penrice v. Parker, Finch's R. 75 (1673); in many early American decisions, Thurston v. Percival, 1 Pick. 415 (Mass., 1823); Bachus v. Byron, 4 Mich. 535 (1857); Arden v. Pattersen, 5 Johns. Ch. 44 (N. Y., 1821); Potts v. Francis, 43 N. C. 300 (1852); and in a few later cases. Lanc. Twp. v. Graves, 48 Ind. App. 499 (1911); Gammons v. Johnson, 69 Minn. 488 (1897); Kelly v. Kelly, 86 Wis. 170 (1893). But in the great majority of jurisdictions such agreements, although often deprecated, are not today held invalid. Taylor v. Bemiss, 110 U. S. 42 (1883); Davis v. Webber, 66 Ark. 190 (1899); Coker v. Oliver, 4 Ga. App. 728 (1908); Etzel v. Duncan, 76 Atl. 493 (Md., 1910); Blaisdell v. Ahern, 144 Mass. 393 (1887); Wilson v. Seeber, 72 N. J. Eq. 523 (1907); Matter of Fitzsimons, 174 N. Y. 15 (1903); Perry v. Dicken, 105 Pa. 83 (1884); Beagles v. Robertson, 135 Mo. App. 306 (1909); unless unconscionable or fraudulent. Robinson v. Sharp, 201 Ill. 86 (1903); Balsbaugh v. Frazer, 19 Pa. 95 (1852); Chester Co. v. Barber, 97 Pa. 455 (1881).

In general choses in action, except for personal injuries, are assignable. See 61 U. of P. L. R. 344. If assignable, agreement to pay contingent fees is usually held to operate as an equitable assignment of the resulting proceeds *pro tanto*—or, more correctly, the plaintiff becomes trustee for the attorney *pro tanto*. Canty v. Latterner, 31 Minn. 239 (1883); Terney v. Wilson, 45 N. J. L. 282 (1883); Harwood v. LaGrange, 137 N. Y. 538 (1893). If the chose in action be unassignable, the agreement gives the attorney no interest in the proceeds whatever. Weller v. Jersey City Ry. Co., 68 N. J. Eq. 659 (1904); Miller v. Newell, 20 S. C. 123 (1883). On the other hand there are decisions holding that such agreement operates as an equitable assignment of the proceeds, even though the cause of action arise out of personal injuries. Cain v. Hockensmith, etc., Co. 157 Fed. Rep. 992 (1907); Patten v. Wilson, 34 Pa. 299 (1859). Others hold the agreement to vest such an interest in the suit itself in the attorney as to prevent the plaintiff from suing *in forma pauperis*. Feil v. Wabash R. Co., 119 Fed. Rep. 490 (1902); Phillips v. L. and N. R. Co., 153 Fed. Rep. 795 (1907); *contra*, The Oriental v. Barclay, 16 Tex. Civ. App. 193 (1897). Its affect as a partial assignment of the chose in action itself does not seem to have been considered. Ames, Cases on Trusts, 63.

A clause in an agreement for a contingent fee prohibiting the client from settling the litigation without the attorney's consent is void as against public policy. Matter of Snyder, 190 N. Y. 66 (1907); *contra*, Beagles v. Robertson, 135 Mo. App. 306 (1909). And, unless severable, invalidates the whole agreement, Davis v. Webber, 66 Ark. 190 (1899).

BILLS AND NOTES—IS THE FACT THAT INTEREST IS OVERDUE SUFFICIENT TO PUT THE HOLDER ON NOTICE?—In McPherrin v. Tittle, 129 Pac. Rep. 721 (Okla., 1913) it was held that a negotiable note is not dishonored by reason of a failure to pay interest prior to maturity of the principal in the absence of a stipulation to that effect and a purchaser is not from that fact alone affected with notice of prior infirmities in the title, but the fact of interest being due and unpaid is a circumstance proper for the consideration of the jury, in connection with other facts, on the question whether the plaintiff is a holder in good faith.

Some of the cases lay down the rule that the failure to pay interest dishonors negotiable paper, and renders it subject in the hands of the purchaser to existing defenses between the original parties. Newell v. Gregg, 51 Barb. 263 (N. Y., 1868); First National Bank of St. Paul v. Commissioners of Scott County, 14 Minn. 77 (1869); Hart v. Stickney, 41 Wis. 630 (1877); Chouteau v. Allen, 70 Mo. 290, 339 (1879); National Bank of Waverly v. Forsyth, 67 Minn. 257 (1897).

The weight of authority, however, appears to be the other way, and indeed the better opinion seems to be that in the absence of a stipulation to the contrary in the instrument itself, the failure to pay interest does not affect the future negotiability of the note or bill; under this rule the *bona fide* holder before maturity takes the instrument free from equities between prior parties, although there are arrears of interest. 1 Daniell on Negotiable Instruments, Fourth

Ed., Section 787; Cromwell v. County of Sac, 96 U. S. 51, 57 (1877); Kelley v. Whitney, 45 Wis. 110 (1878), affirming Boss v. Hewitt, 14 Wis. 260 (1862), and overruling Hart v. Stickney, *supra;* McLane v. Railroad Company, 66 Cal. 606, 632 (1885); Patterson v. Wight, 64 Wis. 289 (1885); Cooper v. Hocking Valley National Bank, 21 Ind. Ap. 358 (1898); Cooper v. Merchants' National Bank, 25 Ind. App. 341, 345 (1900); U. S. National Bank v. Floss, 38 Ore. 68 (1900). The theory upon which this rule is based is that the interest is a mere incident and not a part of the original indebtedness represented by the instrument. Tiedeman on Commercial Paper, Section 297.

Under a number of authorities, however, the nonpayment of interest is not to be entirely disregarded; while it will not of itself be taken to amount to a dishonor of the paper, yet failure to pay interest is sometimes said, as in our principal case, to be a fact proper to be considered by the jury in connection with other circumstances on the question whether the holder has taken the paper in good faith and without actual or constructive notice of existing defenses. National Bank of North America v. Kirby, 108 Mass. 497, 502 (1871); Martin and Bliss v. Railway Company, 79 Ala. 590 (1885); Savings Bank v. Couse, 124 N. Y. Sup. 79 (1910).

BILLS AND NOTES—PURCHASER WITHOUT NOTICE—BONA FIDES—A, having executed a mortgage to B to secure a note payable to B, sold the property expressly subject to the mortgage to C who agreed to pay the note. B likewise transferred the note to C who, before maturity, transferred both the property and the note to D for value. Held, that these facts were sufficent to show that D knew or should have known that A had an equity or defense to the notice and, being therefore not a holder without notice, could not recover. Judy v. Warne, 100 N. E. Rep. 483 (Ind., 1913).

As to what amounts to notice or bad faith, sufficient to negative the right of a purchaser for value before maturity to recover, the decisions, before the N. I. L., were not uniform. In Gill v. Cubit, 3 B. and C. 466 (1824), Lord Tenterden established gross negligence as the test. This was followed in the early American cases and is recognized in a few states today. Did the holder have knowledge of circumstances that would lead a reasonably prudent man to make inquiry? Pennington Bk. v. Bank, 110 Minn. 263 (1910); Farthing v. Dark, 109 N. C. 291 (1891); Mee v. Carlson, 22 S. D. 365 (1908) Pierson v. Huntington, 82 Vt. 482 (1909).

The doctrine of Gill v. Cubit, *supra*, has, however, been repudiated in the majority of jurisdictions before the N. I. L. Goodman v. Harvey, 4 A. and E. 870 (1836); Goodman v. Simonds, 61 U. S. 343 (1857); Phelan v. Moss, 67 Pa. 59 (1870). In these jurisdictions, in the absence of actual notice, the holder must be shown to have had knowledge of such facts that his action in taking the paper amounts to bad faith. Gross negligence or failure to investigate does not make his act *mala fide.* Murray v. Lardner, 69 U. S. 110 (1864); Trust Co. v. Wilson, 161 Mass. 80; Cheever v. Pitts, etc. R. R. Co., 150 N. Y. 59 (1896); Second Nat. Bk. v. Morgan, 165 Pa. 199 (1895); Kavanagh v. Bank, 239 Ill. 404 (1909); Lehman v. Press, 106 Iowa 389 (1898).

The Negotiable Instruments Law, §56, re-enacts the rule of Goodman v. Harvey, *supra.* Act of May 16, 1901, §56, P. L. 194; Allentown Nat. Bk. v. Clay Sup. Co., 217 Pa. 128 (1907). N. Y. Laws of 1909, Ch. 43, N. I. L. §95; Eisenberg v. Selfkowitz, 142 N. Y. App. 569 (1911).

CARRIERS—BAGGAGE—The meaning of the term "baggage" depends upon the peculiar circumstances of each case; but the contract to transport imposes the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use, the quantity and value of which depends upon the passenger's station in life and the purpose of his journey. Sherman v. Pullman Co., 139 N. Y. Suppl. 51 (1913). In this case the plaintiff, a woman, lost a necklace through the negligence of a porter of the defendant company and recovery was allowed since the property was suited to the plaintiff's position in life.

It is well settled that sleeping-car companies are not common carriers of the goods of passengers nor are they liable as innkeepers. Lewis v. Sleeping

Car Co., 143 Mass. 267 (1887); Sealing v. Pullman Car Co., 24 Mo. App. 29 (1886); Adams v. Steamboat Co., 151 N. Y. 163 (1896); but they are under a duty to use reasonable care to guard the passenger from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, liability attaches. Pullman Car Co. v. Arents, 28 Tex. Civ. App. 71 (1902); Carpenter v. R. R. Co., 124 N. Y. 53 (1891).

As to what amounts to luggage is a question which depends solely upon the individual facts of each case. Yazoo R. R. v. Blockman, 85 Miss. 7 (1904). Generally those things are considered as personal baggage which a passenger carries with him for his personal use and convenience on his journey. Withey v. Pere Marquette R. Co., 141 Mich. 412 (1905). And what baggage is reasonably necessary invariably depends upon the traveler's position in life. Dibble v. Brown, 12 Ga. 217, (1852); R. R. v. Froloff, 100 U. S. 24 (1879); Phelps v. London R. Co., 19 C. B. (N. S.) 321 (1865).

Hence, the range of articles which have fallen within the term must necessarily be as diversified as individual tastes and habits. Some of them are: Money sufficient for the journey, Dunlap v. International Co., 98 Mass. 371 (1867); Hickax v. Nangatuck R. R. Co., 31 Conn. 281 (1863); jewelry, Pettigrew v. Barnum, 11 Md. 434 (1857); Maurity v. N. Y. R. R. Co., 23 Fed. 765 (1884); firearms, R. R. Co. v. Ruard, 74 Ark. 125 (1905); but otherwise when the traveler is not a sportsman, Cooney v. Pullman Co., 121 Ala. 368 (1898); fishing tackle, Macrow v. G. W. R. R., L. R. 6 Q. B. 612 (1871); tools of a mechanic, Porter v. Hildebrand, 14 Pa. 129 (1850); hunting dog, Kansas City R. Co. v. Higdon, 94 Ala. 286 (1891); a snuff box, writing paper, and ink, Grant v. Newton, 1 E. D. Smith 95 (1850); a telescope, Cadwallader v. R. R. Co., 9 Low. Can. 169 (1858). And the fact that the articles are not to be used on the journey does not preclude them from being considered as baggage. Curtis v. R. R., H. N. Y. 116 (1878); R. R. Co. v. Baldwin, 113 Tenn. 205 (1905); Toledo R. R. Co. v. Hammond, 33 Ind. 379 (1870).

On the other hand, money in excess of a reasonable amount does not fall within the general meaning. Jordon v. Fall River Co., 59 Mass. 69 (1849); Whitmore v. Steamboat Caroline, 20 Mo. 513 (1855); so, too, where jewelry is not owned by the traveler, Belfast R. Co. v. Keys, 9 H. L. 556 (1861); Metz v. R. R. Co., 85 Cal. 329 (1890); likewise, where the goods carried are intended for sale and not for the owner's private use. Pardee v. Drew, 25 Wend. 459 (N. Y., 1841).

Whether such articles are baggage is in most jurisdictions a question of law for the court. Humphreys v. Perry, 148 U. S. 627 (1893); Connolly v. Warren, 106 Mass. 146 (1870); Kansas R. R. v. Morrison, *supra; contra*, Oakes v. N. P. R. Co., 20 Ore. 392 (1891); Ouimet v. Henshaw, 35 Vt. 605 (1863).

CARRIERS—LIMITATION OF LIABILITY—A stipulation on a second class railway ticket provided that the value of baggage transported under it should not exceed $100, that the ticket must be signed by the purchaser and that all baggage valued in excess of $100 might be transported "at proportionate rates;" it was *held* that notwithstanding such contract, the passenger could recover the full value of the baggage, $783.95, where the loss was occasioned by the negligence of the carrier. Zetler v. Tonopah and G. R. Co., 129 Pac. Rep. 299 (Nev., 1913).

The common law rule is that a common carrier may, by a just and reasonable contract, relieve itself of its common law liability as an insurer. This rule is universally recognized. But the rule is equally as well settled and almost as universally maintained that the carrier cannot contract to relieve itself from liability for loss or damage which is the result of its own negligence or that of its servants. N. Y. C. and H. R. R. v. Lockwood, 17 Wall. 357 (U. S. S. C., 1873); Southern Express Co. v. Barnes, 36 Ga. 532 (1867); Buckland v. Adams Express Co., 97 Mass. 124 (1867); to this latter rule there had been but three exceptions. In New York, a common carrier can limit its liability, for any degree of negligence on its part, even gross negligence, where the contract expressly provides for such exemption and is founded on a valuable consideration. Wilson v. N. Y. C. and H. R. R., 97 N. Y. 87 (1884); Cragin v. N. Y. C. and H. R. R., 51 N. Y. 61 (1872). In Illinois and Wisconsin the rule seems to be that

carriers may, by special contract, limit their liability where the loss or injury results from their negligence, except where such negligence is gross. R. R. Co. v. Davis, 159 Ill. 53 (1895); Wabash R. R. v. Brown, 152 Ill. 484 (1894); Abrams v. R. R., 87 Wis. 485 (1894); Lawson v. R. R., 64 Wis. 455 (1885).

Of late years, however, there is a distinct tendency to allow the carrier to limit its liability to a certain value agreed upon between the shipper and carrier, with certain restrictions. This tendency was first recognized and applied in the leading case of Hart v. P. R. R., 112 U. S. 331 (1884). It has been followed ever since in the federal courts, Caw v. R. R., 194 U. S. 427 (1904); Arthur v. R. R., 204 U. S. 505 (1906); in one case going so far as to limit the liability to $50 where goods were actually worth $15,000. Pierce Co. v. Wells Fargo Co., 189 Fed. 561 (1911). The Pennsylvania courts have refused to follow it, Hughes v. R. R., 202 Pa. 222 (1902); Grogan v. Adams Express Co., 114 Pa. 523 (1886). Iowa, Kansas, Texas and Kentucky, either on account of constitutional or statutory enactment, do not follow it and from the principal case, we see that Nevada has not followed it, though the question was treated very summarily and there was a vigorous dissenting opinion. The other states of the Union have adopted the rule with varying restrictions. Murphy v. Wells Fargo, 99 Minn. 230 (1906); Larsen v. Oregon Short Line, 110 Pac. Rep. 983 (Utah, 1910); High Co. v. Adams Express Co., 63 S. E. Rep. 1125 (Ga., 1909).

It can safely be said, however, that all the courts are tending toward the position taken by the Interstate Commerce Commission in *In re* Released Rates, 13 Inter. Commerce Reports 550 (1908), where the rule of Hart v. Penn. R. R., *supra*, is recognized and approved and worked out reasonably. The decision of the Interstate Commerce Commission, *supra*, has been adopted by the United States Supreme Court in three cases decided in January, 1913; Adams Express Co. v. Croninger, 226 U. S. 491; C. B. and Q. v. Miller, 226 U. S. 513; C. St. P. M. and O. v. Latta, 226 U. S. 519.

CONTEMPT—EDITORIALS—CAUSE PENDING—Certain editorials and articles directly charged that the court corruptly rendered the decision in a certain case then pending, and that it was rendered by reason of a political trade, and not on the law and facts; it was *held* that such publications were a direct attack upon the court as a court and the basis of a contempt proceeding. McDougall, Atty-Gen. v. Sheridan, 128 Pac. Rep. 954 (Idaho, 1913).

This seems to be in accord with the almost universal rule that publications concerning a pending cause, trial, or judicial investigation, constitute contempt when calculated to prejudice or prevent fair and impartial action, *In re* Cheeseman, 49 N. J. L. 115 (1886); Respublica v. Oswald, 1 Dall. 319 (Pa., 1788); Gorham Mfg. Co. v. Dry Goods Co., 92 Fed. 774 (1899); or which seek to influence judicial action by threats or other forms of intimidation, Burke v. Territory, 2 Okla. 499 (1894); State v. Bee Pub. Co., 60 Nebr. 282 (1900); or which reflect upon the court, counsel, parties, or witnesses, respecting the cause, People v. Wilson, 64 Ill. 195 (1872); People v. Stapleton, 18 Colo. 568 (1893); Field v. Thornell, 106 Iowa 7 (1898); or which tend to corrupt or embarrass the due administration of justice, U. S. v. Holmes, 26 Fed. Cas. No. 15, 383.

In *Re* Providence Journal Co., 28 R. I. 489 (1907), it was held that an editorial misstatement of the law as stated in a court's written opinion on a matter of wide application and importance is, although unintentional, a contempt of the court; and in some states, inaccurate publication of a court's decision is, by statute, made a contempt of court. People *ex. rel.* Barnes v. Court of Sessions, 147 N. Y. 290 (1895); State *ex rel.* Haskell v. Faulds, 17 Mont. 140 (1895); *Re* Robinson, 117 N. C. 533 (1895). But the doctrine supported by the weight of authority is that a criticism of the action of the court in a matter then terminated does not constitute contempt. State v. Anderson, 40 Iowa 207 (1875); Storey v. People, 79 Ill. 45 (1875); Watson v. People, 11 Colo. 4 (1888); State v. Kaiser, 20 Or. 50 (1890); *Re* Shannon, 11 Mont. 67 (1891).

CORPORATIONS—CONTRACT BY MAJORITY STOCKHOLDER FOR OWN BENEFIT—PUBLIC POLICY—The holder of the majority of the stock of a corporation sold part of his stock under an agreement with the vendee that they should vote their stock together and thus control the board of directors. The purpose

of this control was to bring about the election of the vendee as secretary of the corporation at a lucrative salary. This agreement was to be revocable only by mutual consent. *Held*—the contract is unenforceable as against public policy. Gilchrist v. Hatch, 100 N. E. Rep. 473 (Ind., 1913).

It is a general proposition that a contract by a director or a majority stockholder whereby he undertakes, in consideration of a private benefit or advantage accruing to himself, to secure the appointment of another to a position of profit in the corporation, is against common honesty and, hence, against public policy. Guernsey v. Cook, 120 Mass. 501 (1876); Noel v. Drake, 28 Kan. 265 (1882); Forbes v. McDonald, 54 Cal. 98 (1880). Even where there is no direct private gain to the stockholder, his mere agreement to keep another person permanently in office in the corporation, is void. West v. Camden, 135 U. S. 507 (1890). An agreement by the majority stockholders that a person buying stock from them shall be elected general manager for a stated period and that he may, at the end of such period sell back the stocks to them at a fixed price, is void. Wilbur v. Stoepel, 82 Mich. 344 (1890). A contract made by a stockholder, upon consideration, to vote for an increase in the salary of one of the corporation officials, is illegal and cannot be enforced. Woodruff v. Wentworth, 133 Mass. 309 (1882). In Cone v. Russel, 48 N. J. Eq. 208 (1891), a proxy for five years was given so as to unite enough stock to control the corporation. The holder of the proxy agreed that the person giving it should have an office at a large salary. This agreement was held void as against public policy. In Fuller v. Dame, 35 Mass. 472 (1836), a corporation which owned land agreed to give some of its stock to a shareholder in a railway corporation in return for his procuring the location of a railway station upon the land in question. This agreement was held void on the ground of public policy.

The cases here considered must be distinguished from cases in which the contract for election to a corporation office in consideration of a purchase of stock by the person to be elected, is entered into by *all* the stockholders of the corporation, or with their consent. Such a contract is valid and binding. Kantzler v. Bensinger, 214 Ill. 589 (1905); Faulds v. Yates, 57 Ill. 416 (1870); Lorillard v. Clyde, 86 N. Y. 384 (1881).

CORPORATIONS—RIGHTS OF STOCKHOLDERS IN EQUITY AGAINST THE DIRECTORS—In Pollitz v. Wabash R. Co., 100 N. E. Rep. 721 (N. Y., 1912), it was said that a stockholder could maintain a bill to set aside an agreement entered into by the directors of a corporation and another concern, whereby the directors secured stock of the corporation for grossly inadequate consideration, but that an answer would be sufficient on demurrer if it admitted that the directors did receive the stock of the corporation in return for full and adequate consideration and if it alleged that this transaction was subsequently ratified by vote of the stockholders or by their acquiescence.

Clearly action by the directors which is *ultra vires*, or which amounts to a fraudulent disposition of the corporate property to the injury of the shareholders' right to a part of the dividends and capital, cannot be ratified by a vote of the majority of the stockholders. Such a transaction can be set aside by equity on motion of a stockholder if he shows that the corporation itself has refused to bring such a suit. Atwood v. Merryweather, L. R. 5 Eq. 464 (1867); Meiner v. Hooper Telegraph Works, L. R. 9 Ch. Ap. 350 (1874); Russell v. Wakefield Water Works, L. R. 20 Eq. Cases 474 (1875); Tomkinson v. Southeastern Ry. Co. L. R. 35 Ch. D. 675 (1887); Von Arnim v. American Tube Works, 188 Mass. 515 (1905); Continental Co. v. Belmont, 206 N. Y. 7 (1912); Dodge v. Woolsey, 18 How. 331 (U. S., 1855).

The stockholder must, in his complaint, set forth a cause of action in favor of the corporation with the same details as would be necessary in a suit by the corporation itself and also he must allege that the board of directors has refused to act and that the stockholders have either ratified the act or that the persons who have participated in the fraudulent transaction control a majority of the votes. Hawes v. Oakland, 104 U. S. 450 (1881); Russell v. Wakefield Water Works, L. R. 20 Eq. Ca. 474 (1875). Where, however, the body of stockholders has no adequate power or authority to remedy the wrong asserted, it is unnecessary to require an application to it to redress the wrong before bring-

ing the representative action. Continental Securities Company v. Belmont, 206 N. Y. 7, 19 (1912); Von Arnim v. American Tube Works, 188 Mass. 515 (1906). Certainly it is sufficient to show that no application was made because of the apparent futility, as where the wrongdoers control the board of directors and the stockholders. Del. and Hudson Co. v. Albany and Susquehanna, 213 U. S. 435 (1908); Russel v. Wakefield, *supra*.

On the other hand if the transaction is not fraudulent, if it is *intra vires*, but amounts to a technical breach of trust, and if adequate consideration is given so that there is no appreciable reduction of the assets then it is merely voidable and may be cured or ratified by the vote of the shareholders or by their acquiescence. Beatty v. N. W. Transp. Co., L. R. 12 App. Co. 589 (1887); Foss v. Harbottle, 2 Hare 461 (Pa., 1843); Skinner v. Smith, 134 N. Y. 241 (1892); Kelley v. Newburyport etc. Co., 141 Mass. 496 (1886); Thompson on Corporations (2d Ed.) §1223, §2043. This is true even though the interested directors control a majority of the stock. United States Steel Corporation v. Hodge, 64 N. J. Eq. 814 (1903); Russell v. Patterson Co., 232 Pa. 113 (1911). But the majority cannot by its vote ratify a fraudulent contract which wastes the assets of the corporation. Russell v. Patterson Co., *supra*; Klein v. Independent Brewing Ass'n., 231 Ill. 594 (1907). If the directors are interested personally in the transaction the burden rests on them of showing that it would be advantageous to the corporation. Robotham v. Prudential Ins. Co., 64 N. J. Eq. 673 (1903).

EVIDENCE—STATE OF MIND—RES GESTAE—In Ickes v. Ickes, 237 Pa. 582 (1913), an action by a wife against her father-in-law for the alienation of her husband's affections, it was said that statements made by the husband one day before his desertion of the plaintiff to the effect that he was leaving her because of her infidelity, were admissible to prove the state of mind of the husband at the time of the desertion and his reasons for so acting. The lower court excluded evidence of this statement on the ground that it was not part of the *res gestae*.

The exception to the rule against hearsay evidence in favor of statements indicative of the state of mind of the declarant and the rule admitting proof of verbal acts as part of the *res gestae* are based on two entirely different theories. Declarations are oftentimes the best and only evidence of the state of mind, hence this exception to the hearsay rule. On the other hand an act or course of conduct is frequently ambiguous, and, therefore, contemporaneous statements are admitted to explain it. Wigmore on Evidence, Vol. 3, §1725, §1772. Where the state of mind is an essential element, as in cases of fraud or domicile, and whenever an intent, coupled with an act, are necessary, proof of the intent can be made by statements made at the time the act is done. So too from statements made within a reasonable time before or after the act the intent with which the act was done may be inferred. Viles v. Waltham, 157 Mass. 542 (1893); Commonwealth v. Trefethen, 157 Mass. 180 (1892); Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285 (1892). That actions for alienation of affection and criminal conversation involve the same elements would appear from the following citations and, therefore, the same rules of evidence should apply: Rose v. Mitchell, 21 R. I. 270 (1899); State v. Robinson, 57 Md. 14 (1881); Wigmore, § 1730.

In several cases, however, statements of the recreant spouse are admitted only when part of the *res gestae* of the act of desertion, or of some other act or conduct relevant to the case. Higham v. Vanosdol, 101 Ind. 160; Bennett v. Smith, 21 Barb. 439 (N. Y., 1856) ; Gilchrist v. Bale, 8 Watts 355 (Pa., 1839); Kidder v. Lovell, 14 Pa. 214 (1850). Statements made prior to the desertion have been admitted to prove the state of the affections of the speaker at that time. Preston v. Bowers, 13 Ohio 1 (1861); Perry v. Lovejoy, 49 Mich. 529 (1893). Prior statements were admitted in one case where they were made in a conversation between the defendant and the unfaithful husband to show: first, that the defendant had used no improper persuasion; and, second, that the husband had reasons of his own for leaving the plaintiff, Bailey v. Bailey, 94 Iowa 548 (1895). Communication between husband and wife has been admitted to show the state of their affections. Sexton v. Sexton, 129 Iowa 487 (1905);

Billings v. Albright, 66 App. Div. 239 (N. Y., 1901). In the latter case, statements by the wife to third persons were not admitted, on the ground that they were not part of the *res gestae*. Subsequent statements were excluded in Lyon v. Lyon, 197 Pa. 212 (1900); but were admitted in Rose v. Mitchell, 21 R. I. 270 (1899).

GUARANTY—SUBROGATION—Where A guaranteed the performance of a contract by B with C, and where B gave a note in payment to C which C indorsed to D, a holder for value, it was held that D was subrogated to C's right of action against A on his contract of guaranty. B and C were both insolvent. Catskill Bank v. Dumary, 100 N. E. Rep. 423 (N. Y., 1913). The court considered this contract of guaranty by a stranger just as much a part of the trust fund for the satisfaction of the debt as were goods or securities set aside by the principal debtor himself.

The right of subrogation is purely equitable, there need be no privity of contract to entitle a person to it. All that is necessary is that he shall not be a volunteer. Cottrell's App., 23 Pa. 294 (1854). The theory is that goods or securities set aside by the debtor, either in the hands of the surety or of the creditor, or of trustees for the payment of this debt, become a trust fund, possessed of all the peculiarities of such property. If the surety discharges the obligation he is entitled to the collateral in the hands of the creditor. If the surety is insolvent the creditor will be substituted to the security in the hands of the surety. Sheldon on Subrogation, p. 238. Some jurisdictions invoke this equity even as to the original obligation, and give the surety whatever preferences or privileges it may possess. But this is more on the theory that there has been an equitable assignment than that it is a part of the trust fund to secure the debt it represents. Lumpkin v. Mills, 4 Ga. 343 (1848); *Ex parte* Ware, 5 Rich Eq. 473 (S. C., 1853). But in England, the original obligation is extinguished whether paid by principal or by surety. Copis v. Middleton, 1 Turn. and Russ. 224 (1823).

The principal case raises the question whether a guaranty given by a third person, a stranger to the original contract, to the surety that the principal will perform his contract and pay the notes when mature, is collateral to which the creditor is entitled in case of the insolvency of the surety. In permitting subrogation, this case seems to be *contra* to the decided weight of opinion. The frequently repeated and applied rule is that the creditor is not entitled to such indemnity given by a third person to save the surety harmless. Taylor v. Bank, 87 Ky. 398 (1888); Black v. Kaiser, 91 Ky. 422 (1891); Liggett v. McClelland, 39 Ohio 624 (1884); Hampton v. Phipps, 108 U. S. 260 (1882); O'Neill v. Bank, 34 Mont. 521 (1906); Seward v. Huntington, 94 N. Y. 104 (1883); Brandt, Suretyship and Guaranty (3d Ed.), Vol. 1, §361.

HOMICIDE—MURDER IN FIRST DEGREE—CONSTRUCTIVE INTENT—The accused, upon finding another man with a girl to whom he had been paying attention, shot the man, after whose escape, the accused shot and killed the girl, but without deliberation or premeditation. It was held that the intent necessary for a conviction for first degree murder could not be supplied by construction because: (1) The homicide was not connected with the felonious assault upon the man; (2) The felonious assault upon the girl had been merged with the homicide; People v. Spohr, 100 N. E. Rep. 444 (N. Y., 1912).

As to the first point the court was merely carrying out the doctrine of People v. Huter, 184 N. Y. 237 (1900), where the defendant unintentionally shot a policeman several blocks from the house he had been robbing, and it was held not to be a murder in the commission of the burglary. *Contra*, State v. Brown, 7 Ore. 186 (1879); Conrad v. State, 75 Ohio 52 (1906).

The theory of the court in the second point is, that under this statute (Consol. Laws, 1909, c. 40), the accused can only be convicted of first degree murder when he kills with a premeditated and deliberate design to take life. Therefore, if the jury could consider that the accused was in the commission of a felony which resulted in the death of the girl, but without the premeditated and deliberate intent to take her life, the distinction made by the statute would be abolished and the result would be the same as at common law. They state

the rule to be "to constitute murder in the first degree by the unintentional killing of another while engaged in the commission of a felony, we think that, while the violence may constitute a part of the homicide, yet the other elements constituting the felony in which he is engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder."

But for a *contra* doctrine see State v. Nueslein, 25 Mo. 126 (1857), "The wilfully and maliciously inflicting great bodily harm upon another is a felony under our statute of crimes and punishments. Therefore, although the jury may believe that the prisoner did not in this case strike the deceased with the stick with the specific intent to kill her at the time, but with the design maliciously to inflict upon her great bodily harm, and the deceased came to her death by wounds inflicted under such circumstances, then such killing is murder in the first degree." Accord, Josey v. State, 137 Ga. 773 (1912).

HOMICIDE—SELF DEFENSE—In Alabama, in a trial for homicide, the lower court refused to instruct the jury that "if the circumstances attending the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and he honestly believed such to be the case, then he had the right to shoot the deceased in his own defense, although as a matter of fact, he was not in actual danger." *Held*—This was error, and the instruction should have been given. Chaney v. State, 59 So. Rep. 604 (Ala., 1912).

To sustain a plea of self-defense, the accused must show that he actually apprehended danger and acted on such apprehension. State v. Gentry, 125 N. C. 733 (1899); Pugh v. State, 132 Ala. 1 (1901). It is enough if the danger which he seeks to avert is apparently imminent, irremediable and actual. Kepley v. People, 215 Ill. 358 (1905); People v. Thomson, 145 Cal. 717 (1905). A *bona fide* belief in imminent danger, in the careful and proper use of his faculties, and on reasonable grounds for such belief is, accordingly, sufficient although the accused is mistaken as to the existence or imminence of the danger. Johnson v. State, 79 Miss. 42 (1901); State v. Brown, 5 Penn. 339 (Del., 1905); Chaney v. State, *supra*.

The party attacked is not excusable in using greater force than is necessary to repel the attack. Oliver v. State, 17 Ala. 587 (1849); Com. v. Dougherty, 107 Mass. 243 (1871). The right of self defense commences when the necessity, real or apparent, begins; and it ends when the necessity ceases. Hobbs v. State, 16 Tex. App. 517 (1884).

There must not only have been danger or apparent danger to the accused, but he must have apprehended such danger, and must really have acted under the influence of fear, and not in a spirit of revenge. Draper v. State, 4 Baxt. 246 (Tenn., 1874); Walker v. State, 97 Ga. 350 (1895); Appleton v. People, 171 Ill. 473 (1898).

JUDGMENTS—COLLATERAL ATTACK—An action was brought to quiet title to certain land, and it was alleged that an order of court directing plaintiff, a guardian, to sell the land was procured by fraud. *Held*—The suit was a direct attack on the order and not a collateral attack, as one of its ultimate purposes was to set aside the order of sale. Brown v. Trent, 128 Pac. Rep. 895 (Okl., 1912).

The court, in discussing the question said, "Expressions will be found indicating that an attack upon the judgment by an independent suit and not by an appeal is a collateral attack; but these expressions are inaccurate. . . . . An attack upon a judgment for fraud in its procurement is a direct attack over which the courts of equity take jurisdiction."

A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree. A bill in equity to obtain relief from a judgment should, accordingly, be considered a collateral attack within this definition, because it is not within the power of the court to annul, vacate or modify the judgment. The better view is, therefore, *contra* to the principal case. The court of equity merely inquires whether there are any equitable circumstances to prevent the person in whose favor the judgment was recovered from enforcing or taking advantage of it;

the judgment complained of is permitted to stand and is not set aside. Freeman on Judgments, Section 485; Morrill v. Morrill, 20 Oregon 96 (1890), with extensive notes in 23 Am. St. Rep. 117; Oneil v. Potoin, 13 Idaho 721 (1907); Insurance Co. v. Mobley, 90 S. C. 552 (1911). Some courts make a distinction and hold that suits in equity to set aside judgments at law are indirect, and not exactly collateral. Le Mesnager v. Variel, 144 Cal. 463 (1904); Eichhoff v. Eichhoff, 107 Cal. 42 (1895).

In accord with the principal case, the following cases may be cited: McNeill v. Edie, 24 Kans. 108 (1880); Smith v. Morrill, 12 Col. App. 233 (1898); Houser v. Bonsal, 149 N. C. 51 (1908).

JUDGMENTS—CONCLUSIVENESS—In a second suit between the same parties for a different cause of action, the former decision is conclusive only as to the questions and right actually decided therein and nothing more. So the dismissal of a former bill by the defendant to remove the cloud from his title did not preclude his defense in an action to account for coal and timber subsequently taken from the land. Hudson v. Iguano Land and Mining Co., 76 S. E. Rep. 797 (W. Va., 1912).

The case is a good application of the rule as laid down in the leading case of Cromwell v. County of Sac, 94 U. S. 351 (1876). Where the cause of action and the parties are identical a judgment is conclusive not only as to all matters actually determined thereby, but also all matters which might or ought to have been adduced to sustain or defeat the action. Cromwell v. County of Sac, *supra;* Davis v. Brown, 94 U. S. 428 (1876); Cook v. Darling, 35 Mass. 393 (1836); Stokes v. Stokes, 172 N. Y. 327 (1902); Foster v. Wells, 4 Tex. 101 (1894); Fishburne v. Ferguson, 85 Va. 324 (1888); Biern v. Ray, 49 W. Va. 129 (1901). The form of the action being immaterial. Trescott v. Lewis, 12 La. Ann. 184 (1857). But when the second suit between the parties is for a different cause of action, the former judgment operates as an estoppel on only such matters as were actually determined and shown to be determined. Cromwell v. County of Sac, *supra;* Davis v. Brown, *supra;* Russell v. Place, 94 U. S. 606 (1876); De Sollar v. Hanscome, 158 U. S. 216 (1894); Oregonian R. Co. v. Oregon R. and Nav. Co., 27 Fed. 277 (1886); Brown v. Schintz, 109 Ill. App. 598 (1903); Crandall v. Gallup 12 Conn. 365 (1837); Young v. Pritchard, 75 Me. 513 (1883); City of Paterson v. Baker, 51 N. J. Eq. 49 (1893); Jones v. Beaman, 117 N. C. 259 (1895); Breading v. Blocher, 29 Pa. 347 (1857); Almy v. Daniels, 15 R. I. 312 (1886). Or such matters as are necessarily involved. Bond v. Markstrum, 102 Mich. 11 (1894); Stokes v. Stokes, *supra.* But are not conclusive as to questions which are collateral and not actually determined.

LIBEL—INNUENDO—DECLARATION—In an action for libel, the publication contained large, flaring headlines referring to the plaintiff as "McGreary with party arrested for kicking woman who now lies at death," *etc.*; but the declaration contained no innuendo. *Held*—The absence of innuendo is immaterial, and the jury was, therefore, warranted in interpreting the words to mean that the plaintiff was a participant in an assault and battery on the woman. McGreary v. Leader Publishing Co., 52 Pa. Super. Ct. 29 (1912).

When the defamatory character of an utterance is latent, it is necessary for the plaintiff to explain the words and phrases and disclose their true meaning. Burdick, Law of Torts (2d Edition) 503; Crashley v. Press Co., 179 N. Y. 27 (1904). This portion of the complaint is important; it is known as the innuendo. But the true meaning of words cannot be extended by innuendo beyond their natural import, aided by reference to the extrinsic facts with which they may be connected. Camp v. Martin, 23 Conn. 86 (1854).

The office of an innuendo is to aver the meaning of the language published, but if the common understanding of mankind takes hold of the published words, and at once, without difficulty or doubt, applies a libelous meaning to them, an innuendo is not needed, and if used, may be treated as useless surplusage. Hayes v. Press Co., 127 Pa. 642 (1889); Collins v. Dispatch Publishing Co., 152 Pa. 187 (1892).

The principal case, therefore, in holding that where the words are not ambiguous no innuendo is necessary, is in accord with the general rule. Carrol v. White,

33 Barb. 615 (N. Y., 1861); Adams v. Lawson, 17 Gratt. 250 (Va., 1865); Carter v. Andrews, 16 Pick. (Mass., 1846).

LIBEL AND SLANDER—OFFICIAL DUTY—The publication of an article stating that the district attorney had charged the sheriff with being derelict in his duty and would bring proceedings to have him removed from office was held libelous *per se*, regardless of whether the act charged was a violation of the sheriff's official duty or not. Hagener v. Pulitzer Pub. Co., 152 S. W. Rep. 107 (Nev., 1912).

The case follows the recognized doctrine as to public officers or employes. Words, though not actionable in themselves, may become so by charging misconduct in office in two ways: (1) If they impute acts punishable by indictment which would not be so if done by a person not in office. Allen v. Hillman, 12 Pick. 101 (Mass., 1831); Taylor v. Kneeland, 1 Dougl. 67 (Mich., 1843); Gore v. Blethen, 21 Minn. 80 (1874); Harris v. Terry, 98 N. C. 131 (1887). (2) If they tend to disgrace and disparage one in an office of profit or honor, and to deprive him of it. Allen v. Hillman, *supra*. And it is not necessary that they should import a charge of crime. Sillars v. Collier, 151 Mass. 50 (1890); Gore v. Blethen, *supra*. While any language, whether written or spoken, imputing want of integrity, lack of due qualification, or a dereliction of duty is actionable *per se*. Wofford v. Meeks, 129 Ala. 349 (1900); Rea v. Wood, 105 Cal. 314 (1894); Prosser v. Callis, 117 Ind. 105 (1888); Evening Post Co. v. Richardson, 113 Ky. 641 (1902); Kilgore v. Newspaper Co., 96 Md. 16 (1902); Sillars v. Collier, *supra*; Hay v. Reid, 85 Mich. 296 (1891); Martin v. Paine, 69 Minn. 482 (1897); Heller v. Duff, 62 N. J. L. 101 (1898); Hook v. Hackney, 16 S. and R. 385 (Pa., 1827); Moss v. Harwood, 102 Va. 386 (1904); Smith v. Utley, 92 Wis. 133 (1896).

But words affecting a man in his office will not be slanderous unless he is in the office at the time of speaking. Allen v. Hillman, *supra;* Forward v. Adams, 7 Wend. 204 (N. Y., 1831); McKee v. Wilson, 87 N. C. 300 (1882). But to be libelous, it is sufficient to expose the plaintiff to ridicule or contempt and degrade him in the estimation of the community, though his term of office be expired at the time of publication. Jarman v. Rea, 137 Cal. 339 (1902); Russel v. Anthony, 21 Kan. 450 (1831); Sharp v. Laison, 67 Minn. 428 (1897); Cramer v. Riggs, 17 Wend. 209 (N. Y., 1837); Eviston v. Cramer, 47 Wis. 659 (1879).

MASTER AND SERVANT—EJECTION OF TRESPASSERS—AUTHORITY OF BRAKEMAN—A carrier is not liable to a trespasser for injuries received in being ejected from a freight train by a brakeman, since the latter has no implied authority to do such an act. Harrington v. Boston and Maine R. R., 100 N. E. Rep. 606 (Mass., 1913).

As a general principle of jurisprudence, an owner of premises owes no duty to trespassers thereon. Wright v. Boston R. R., 129 Mass. 440 (1879); Phila. R. R. v. Hummell, 44 Pa. 375 (1862); since the courts will not aid a wrong-doer. Kirtley v. Chicago *etc.* R. Co., 65 Fed. 386 (1895). But the occupier must do him no wilful or wanton injury. Frost v. Eastern R. Co., 64 N. H. 220 (1886); Rosenthal v. New York C. R., 112 App. Div. 438 (N. Y., 1906).

The liability in instances like the principal case is not founded upon the duty and obligation imposed by the law of common carriers, but is referable to the law of agency. Faber v. Pac. Ry. Co., 116 Mo. 81 (1893). And in order to bind the company, it must appear that the acts of the employes were within the scope of their authority, express or implied. Rathbone v. Oregon R. Co., 40 Ore. 225 (1901); Morris v. Brown, 111 N. Y. 318 (1888).

Jurisdictions which hold it is one of the implied duties of a brakeman to eject trespassers from passenger trains do so on the theory that he is the guardian and protector of his master's property. Hoffman v. N. Y. C. R. R., 87 N. Y. 25 (1881); but his actions are subject to the conductor's authority. Walker v. R. R., 23 L. T. R. 14 (1890); and he must not act in a careless or malicious manner. Rounds v. R. R. Co., 64 N. Y. 129 (1876). But no such implication arises in the case of a brakeman on a freight train. L. S. and M. S. Ry. Co. v. Peterson, 144 Md. 214 (1895); Chicago and Co. Ry. v. Brackman, 78 Ill. App. 141 (1898); as his employment relates only to the exact duties which his posi-

tion suggests. R. R. Co. v. Anderson, 82 Texas 516 (1891); Cauley v. Pittsburgh R. R. Co., 98 Pa. 498 (1881); C. and O. R. R. Co. v. Anderson, 93 Vir. 650 (1896); unless he was engaged generally to remove trespassers. Marion v. R. R., 59 Iowa 428 (1882).

On the other hand, there are numerous courts which draw no distinction between the kinds of trains as to the duties attaching to the position of a brakeman. Breng v. Chicago and Co. R. R., 64 Minn. 173 (1896); and the right of such a servant to eject trespassers falls within his implied duties. Hayes v. Southern Ry. Co., 141 N. C. 195 (1906); Folley v. R. R., 16 Okla. 32 (1905); R. R. v. Kelly, 36 Kan. 655 (1887); Smith v. R. R. ,95 Ky. 11 (1893). In this line of decisions the brakeman's power to eject lies in his complete supervision and care over the company's property. Dixon v. N. P. R. R., 37 Wash. 310 (1905).

A like difference of opinion exists where the circumstances are those of station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine. Flower v. R. R. Co., 69 Pa. 210 (1871); Towanda Coal Co. v. Heeman, 86 Pa. 418 (1878); Polatty v. Charleston Ry. Co., 67 S. C. 391 (1903); Breng v. Chicago R. R. Co., *supra*.

MASTER AND SERVANT—LIABILITY OF MASTER WHEN SERVANT IS HIRED TO ANOTHER—Where a livery stable keeper, in order to carry out a contract, hires a team and driver from another man, and such driver in the course of the work injuries a third party, he is not *pro hac vice* the servant of him to whom the property is furnished, there being no element of control exercised by the hirer. Schmedes v. Deffaa, 138 N. Y. Suppl. 931 (1912). In this case the defendant placed the team under the care of the party, an undertaker, for whom the work was to be done, the latter then directing the driver to proceed to the funeral.

A master is liable for the wrongs of his servant since the former is bound to see that his affairs are so conducted that others are not injured. Farwell v. Boston *etc.* R. R., 4 Met. 49 (Mass., 1842); but a servant may remain the general servant of his original master and still be the servant of the person to whom he may be lent for particular employment. Donovan v. Laing, 1 Q. B. 629 (1893); Byrne v. Kansas City R. R., 61 Fed. 605 (1894). The test is whether, in the particular service which he is engaged to perform, he continues under the direction of his original master or becomes subject to that of the person to whom he is hired. Geer v. Darrow, 61 Conn. 220 (1891); Clapp v. Kemp, 122 Mass. 481 (1847); Gahagan v. Aermotor Co., 67 Minn. 252 (1897). The determining factor is in whom the right to exercise such control exists. Sounders v. Toronto, 26 Ont. App. 265 (1900); Dewar v. Tasker, 22 T. L. R. 303 (1906).

Hence, where the servant so loaned out is not subject to his original master's orders, the latter is not bound by the former's acts. Jones v. Scullard, 2 Q. B. 565 (1898); Colter v. Lindgren, 106 Cal. 602 (1895); Samuelian v. Tool Co., 168 Mass. 12 (1897); Weaver v. Jackson, 138 N. Y. Supp. 609 (1913); for the servant is then subject to the exclusive control of the hirer. DeVoir v. Lumben Co., 64 Wis. 616 (1885); Kimball v. Cushman, 103 Mass. 194 (1869); Keltor v. Fifer, 26 Pa. Super. 603.

But where absolute control is not vested in the hirer, the doctrine of *respondeat superior* is applied, which renders the master of the servant liable for injuries to third parties. Quaman v. Burnett, 6 M. and W. 499 (1840); Laugher v. Pointer, 5 B. and C. 547 (1826); Little v. Hacket, 116 U. S. 366 (1886); Ames v. Jordon, 71 Me. 540 (1880); Hershberger v. Lynch, 11 Atl. 642 (Pa., 1887); Fenner v. Crips, 109 Iowa 455 (1899). Even where the hirer selects the driver, Joslin v. Ice Co., 50 Mich. 516 (1885); but otherwise when injuries are attributable directly to the orders of the hirer. Ewing v. Shaw, 83 Ala. 333 (1887).

The principal case, applying the control test of Standard Oil Co. v. Anderson, 212 U. S. 215 (1908), held the hirer not liable for the negligence of the driver. There were two dissenting opinions based on a difference of ideas as the elements of control exercised by the hirer.

MECHANICS' LIENS—MATERIALS—A contractor leased a steam shovel for use in the construction of public works. *Held*—The lessor was not entitled to

a lien for its rental, under a statute giving a lien to one who shall furnish "materials to a contractor for the construction of a public improvement." Troy Public Works Co. v. City of Yonkers, 100 N. E. Rep. 700 (N. Y., 1912).

The cases throughout the United States are in accord with the principal case. One renting horses for use in construction work is not entitled to a lien under a statute giving a lien to one who shall "furnish any materials, machinery, fixtures or other things toward the building, construction, or equipment of any railroad." St. L. I. M. and S. R. R. v. Love, 74 Ark. 528 (1905); so also one letting horses by the month to another to haul lumber for a third person is not entitled to a lien upon the lumber for the rental thereof under a statute giving a lien for personal services and for services of a team, upon lumber, as, by such lease, the horses become the lessee's for the time being, and it was he who might have a lien for his services and the use of the horses, and not the owner thereof. McMullin v. McMullin, 92 Me. 336 (1898); Richardson v. Hoxie, 90 Me. 227 (1897). Where horses are leased for use in work of a lienable nature upon logs or lumber, the lessor is not entitled to a lien for their hire, unless used and worked by him or his servants under a statute giving a lien upon logs or lumber to any person performing services in cutting or hauling them. Edwards v. Lumber Co., 108 Wis. 164 (1900); Lohman v. Peterson, 87 Wis. 227 (1894); Mabie v. Sines, 92 Mich. 545 (1892). In McAuliffe v. Jorgenson, 107 Wis. 132 (1900), it was held that one renting a well-boring machine to a contractor is not entitled to a lien under a statute similar to the principal case.

The states of Texas and Minnesota are the only jurisdictions in which a contrary rule has been established and there the statutes expressly provide that a lien may be acquired by any person, etc., "who may furnish machinery, fixtures or tools," etc., Texas, Laws 1889, c. 98; and "whoever performs labor or furnishes skill, material, or machinery," Minnesota, Laws 1889, c. 200, §3. These statutes are so radically different that the cases of Burke v. Brown, 10 Tex. Civ. App. 298 (1895), and Perry v. Duluth Transfer Co., 56 Minn. 306 (1894), cannot be regarded as applicable to this discussion.

A lien, however, is uniformly sustained in favor of one furnishing explosives for use in construction work. Schaghticoke Powder Co. v. R. R. Co., 76 N. E. Rep. 153 (N. Y., 1905); Keystone Mining Co. v. Gallagher, 5 Colo. 23 (1879); Cal. Powder Wks. v. Blue Tent Co., 22 Pac. 391 (Cal., 1889); Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193 (1889). The distinction between the powder cases and the principal case being that, while the powder did not remain in the completed construction, yet it was used up in the work, whereas the steam shovel, teams, *etc.*, survive the construction work and remain the property of their owner.

NEGLIGENCE—INNKEEPER—DUTY TO INTOXICATED GUEST—An intoxicated guest fell from a hotel porch and subsequently died of exposure. The innkeeper, who after discovering his situation, but not his injury, allowed him to remain there, was held not liable, the act being mere nonfeasance. Scholl v. Belcher, 127 Pac. Rep. 968 (Ore., 1912).

It is the duty of an innkeeper to take reasonable care of his guests. Scott v. Churchill, 15 Misc. 80 (N. Y., 1895); Sandys v. Florence, 47 L. J. C. P. 598 (1878); West v. Thomas, 97 Ala. 622 (1892); Omaha Hotel Ass. v. Walters, 23 Neb. 280 (1888). He is not, however, an insurer. Weeks v. McNulty, 101 Tenn. 495 (1898); Clancy v. Barker, 131 Fed. 161 (1904); Sheffer v. Willoughby, 163 Ill. 518 (1896). So if a defect in the premises is obvious the guest must use reasonable care. Smeed v. Morehead, 70 Miss. 690 (1893); Bremer v. Pleiss, 121 Wis. 61 (1904); Ten Broek v. Wells, 47 Fed. 690 (1891).

Drunkenness does not relieve a man from the same degree of care required of a sober man. Fisher v. R. R., 39 W. Va. 366 (1894); Welty v. R. R., 105 Ind. 55 (1885); Rollestone v. Cassirer, 3 Ga. App. 161 (1907); Keeshan v. Elgin Tract Co., 229 Ill. 533 (1907). A carrier is not bound to care for a drunken passenger. Statham v. R. R., 42 Miss. 607 (1869); R. R. v. Woodward, 41 Md. 268 (1874). But is bound to do nothing which, in view of his helpless condition will expose him to unnecessary danger. Weber v. R. R., 33 Kan. 543 (1885); Wheeler v. R. R., 70 N. H. 607 (1900); Black v. R. R., 193 Mass. 448 (1906); R. R. v. Marrs, 119 Ky. 954 (1905).

The doctrine of the last clear chance, that where one gratuitously assumes control of the situation a duty arises similar to that of a gratuitous bailee, R. R. v. State, 29 Md. 420 (1868); R. R. v. State, 41 Md. 268 (1874); Dych v. R. R., 79 Miss. 361 (1901); Depue v. Flatan, 100 Minn. 299 (1907); does not apply because the defendant has done no affirmative act.

PROPERTY—WILLS—LAWFUL ISSUE—The words "lawful issue," in the absence of an expressed contrary intention, mean only those born in lawful wedlock, and so children subsequently legitimated by the operation of a statute will not take under such a devise. Central Trust Co. v. Skillin, 138 N. Y. Suppl. 884 (1912).

The word "issue" means, *prima facie*, heirs of the body. Daniel v. Whartenby, 84 U. S. 639 (1873); Wright v. Gaskill, 74 N. J. Eq. 742 (1908); Beckley v. Riegert, 212 Pa. 91 (1905); Robins v. Quinliven, 79 Pa. 333 (1875); Klepner v. Laverty, 70 Pa. 70 (1871); and includes all lineal descendants. Cherry v. Mitchell, 108 Ky. 1 (1900); Jackson v. Jackson, 153 Mass. 374 (1891); Juglis v. McCook, 68 N. J. Eq. 27 (1904); Schmidt v. Jewett, 195 N. Y. 486 (1909); Miller's Ap., 52 Pa. 113 (1866); Pearce v. Rickard, 18 R. I. 142 (1893). Unless it appears that the testator intended to use it in a restricted meaning, as children, Arnold v. Alden, 173 Ill. 229 (1898); Union Safe Deposit Co. v. Dudley, 104 Me. 297 (1908); King v. Savage, 121 Mass. 303 (1876); Coyle v. Coyle, 73 N. J. Eq. 528 (1907); Palmer v. Dunham, 125 N. Y. 68 (1890); *In re* Nice, 227 Pa. 75 (1910); Logan v. Cassidy, 71 S. C. 175 (1905). Or grandchildren, Cheotal v. Schreiner, 48 N. Y. 683 (1896); Birely's Est., 7 Pa. Dist. 395 (1898).

The words "issue," "children" and "heirs at law" have been held not to include adopted children. Russel v. Russel, 84 Ala. 48 (1887); Wyeth v. Stone, 144 Mass. 441 (1887); Reinder v. Koppelman, 94 Mo. 338 (1887); Jenkins v. Jenkins, 64 N. H. 407 (1887); Matter of Leask, 197 N. Y. 193 (1910); Schafer v. Eneu, 54 Pa. 304 (1867). *Contra*, Hartwell v. Teft, 19 R. I. 644 (1896), and under special circumstances Sewall v. Roberts, 115 Mass. 262 (1874); Warren v. Prescott, 84 Me. 483 (1892).

The words "lawful issue" will not include illegitimate children. Black v. Cartwell, 10 B. Mon. 188 (Ky., 1849); Olmstead v. Olmstead, 190 N. Y., 458 (1908); U. S. Trust Co. v. Maxwell, 26 Misc. 276 (N. Y., 1899). Or even the word "issue" standing alone. Flora v. Anderson, 67 Fed. 182 (1895); Dogget v. Mosely, 52 N. C. 587 (1860); Gibson v. McNeely, 11 Ohio 131 (1860). Though subsequently legitimated. Trust Co. v. Maxwell, *supra;* Hicks v. Smith, 94 Ga. 809 (1894); *contra*, Miller's Ap., 52 Pa. 113 (1866). Nor will an illegitimate child take under "lawful issue" when by statute he had been rendered capable of inheriting by adoption. Brisbin v. Huntington, 128 Iowa 166 (1905); Jenkins v. Jenkins, 64 N. H. 407 (1887).

PUBLIC SERVICE CORPORATIONS—PUBLIC AND PRIVATE USE—Where a public service water company is given the power of eminent domain in order that it may be able to furnish water to all customers it is entitled to condemn a right of way for a pipe line over private property in order that it may fulfill a contract with a railroad and other corporations, entered into for profit, and requiring an additional supply. Such an undertaking is not a private use. Jeter v. Vinton-Roanoke Water Co., 76 S. E. Rep. 921 (Va., 1913).

It is, of course, settled beyond doubt that taking for other than a public use violates the fourteenth amendment of the federal constitution. Matter of Tuthill, 36 App. Div. 492 (N. Y., 1899); Fallbrook Dist. v. Bradley, 164 U. S. 112 (1896). So also it is undisputed that an act authorizing a taking for a private as well as a public use is utterly void unless the two provisions can be separated. Atty. Gen. v. Eau Claire, 37 Wis. 400 (1875); Sadler v. Laughman, 34 Ala. 311 (1859). Whether or not a given use is a public or private one is ultimately a judicial question and local conditions are the determining factors. Haviston v. Ry. Co., 208 U. S. 598 (1907). The extent of the power, of course, varies in the different states according to their statutory provisions on the subject and the rights and privileges of any given public service corporation are often expressly defined and limited in the charter.

As regards the principal case, it is generally true that a public service water company is not obliged to supply water for all purposes to which the applicant may wish to devote it—Wyman Pub. Serv. Corp., Vol. 1, p. 233—but is only bound to supply an amount which is reasonable for domestic use. Barnard Castle Urban Dist. v. Wilson, 2 Ch. Div. 813 (1901). How far such a company is entitled, if it wishes, to supply upon a public basis for extraordinary demands and to exercise the power of eminent domain in order to furnish such service necessarily depends upon the terms of its charter. In the principal case the charter of the water company was very broad in its terms, practically authorizing the company to supply all who demanded it. In the absence of such broad provisions, however, the cases seem to hold that these water companies have not the right to exercise the power of eminent domain in order to reach and supply, on special contracts, various private corporations with water which is to be employed for manufacturing purposes or in commercial processes. *In re* Barre Water Co., 62 Vt. 27 (1889); Jordan v. Indianapolis Water Co., 61 N. E. Rep. 12 (Md., 1901); and Boonton v. United Water Supply Co., 70 N. S. Eq. 692 (1906).

SALES—WARRANTY OR REPRESENTATION—If the vendor of his own accord, without any request from the vendee, says of a horse: "You need not look for anything, the horse is perfectly sound," this constitutes a warranty of soundness. Schowel v. Reade, Ir. Rep. (1913) 2 K. B. 64.

A warranty is an express or implied statement of something which the party undertakes shall be a part of the contract yet collateral to the express object of it. Lunt v. Wrenn, 113 Ill. 168 (1885). To constitute a warranty no particular form of words is required, Warren v. Phila. Coal Co., 83 Pa. 437 (1877); therefore, the word "warrant" need not necessarily appear in the contract. Erskine v. Swanson, 45 Neb. 767 (1895); Jones v. Quick, 28 Ind. 125 (1867). A mere statement by the vendor of his own opinion and belief, not amounting to a positive affirmation or statement of fact, upon a matter concerning which a purchaser is to exercise his own judgment, does not amount to a warranty. White v. Stelloh, 74 Wis. 435 (1889); Hillman v. Wilcox, 30 Me. 170 (1849); Tucksbury v. Bennett, 31 Iowa 83 (1871).

It is sometimes said that where the vendor states something as a fact this constitutes a warranty. Riddle v. Webb, 110 Ala. 599 (1895). On the other hand, it has been held that a naked averment of a fact is not a warranty, but may be considered with other circumstances. Holmes v. Tyson, 147 Pa. 305 (1892). The courts very often say that the statement must be intended and understood by the parties to be a warranty. Mattock v. Meyers, 64 Mo. 531 (1877); McGrew v. Forsyth, 31 Iowa 179 (1870); Holmes v. Tyson, *supra*. If the vendor's words show an intention to warrant and are relied on by the vendee as an inducement to buy, the claim by the vendor that he did not intend to warrant is of no avail. Hawkins v. Pemberton, 51 N. Y. 198 (1872); Halliday v. Briggs, 15 Neb. 219 (1883).

It would seem that the vendee must, in most jurisdictions, rely upon the warranty. Fairbank Canning Co. v. Metzger, 118 N. Y. 260 (1890); Watson v. Roode, 30 Neb. 264 (1890); Evans v. Schriver Laundry Co., 57 Ill. App. 70 (1894); *contra*, Shordan v. Kyler, 87 Ind. 38 (1882). A test which has been laid down as to whether a statement constitutes a warranty or not is: Does the vendor assert a fact of which the buyer is ignorant, or does he merely express an opinion on a subject on which the buyer may also be expected to use his judgment? Kenner v. Harding, 85 Ill. 264 (1877); Reese v. Bates, 94 Va. 321 (1897).

SPECIFIC PERFORMANCE—SALE OF LAND—EFFECT OF FIRE—On a bill for specific performance of a contract for sale of real estate, where fire destroyed the buildings before the execution of the deed or payment of balance of purchase money, it was held that the vendor could not obtain specific performance and the loss must fall upon the vendor. Good v. Jarrard, 76 S. E. Rep. 698 (S. C., 1912).

The doctrine of the principal case, that the vendor must bear the loss by fire or other accident happening between the making of the contract and its

completion, is *contra* to the weight of authority and is followed directly in but five other state courts: Cutcliff v. McAnally, 88 Ala. 507 (1889); Gould v. Murch, 70 Me. 288 (1879); Thompson v. Gould, 20 Pick. 134 (Mass., 1838); Wilson v. Clark, 60 N. H. 352 (1880); Powell v. Dayton Co., 12 Ore. 488 (1885). The question is expressly left open in Wetzler v. Duffy, 78 Wis. 170 (1890). The New York courts seem to favor the rule in the principal case in their later decisions, Smith v. McCluskey, 45 Barb. 610 (1866); Goldman v. Rosenberg, 116 N. Y. 78 (1889); Listman v. Hickey, 65 Hun. 8 (1892); but in Listman v. Hickey, *supra*, which on its facts is more nearly like the principal case, Patterson, J., based his opinion upon the fact that the contract in question was for both real and personal property and was entire; he distinctly recognized the general rule to be that of Paine v. Meller, *infra*, but distinguished this case from it on grounds given above.

The rule followed in the majority of jurisdictions (*contra* to the principal case) that the loss falls upon the vendee, was first laid down in Paine v. Meller, 6 Vesey, 349 (Eng., 1801), and has been followed repeatedly in this country: Willis v. Wozencraft, 22 Cal. 607 (1863); Sherman v. Loehr, 57 Ill. 509 (1871); Cottingham v. Fireman's Co., 90 Ky. 439 (1890); Skinner v. Houghton, 92 Md. 68 (1900); Walker v. Owen, 79 Mo. 563 (1883); Franklin Co. v. Martin, 40 N. J. L. 568 (1878); Gilbert v. Port, 28 Ohio 276 (1876); Dunn v. Yakish, 10 Okl. 388 (1900); Elliott v. Ashland Co., 117 Pa. 548 (1888); Brakhage v. Tracy, 13 S. D. 343 (1900).

If the vendor agrees expressly to deliver possession of premises in the same condition in which they were at the time of the bargain, he must, obviously, bear the loss resulting from fire or other accident. Marks v. Tichenor, 85 Ky. 536 (1887). It is equally clear that a person, whether he be the vendor or vendee, must be answerable for any loss due to his own negligence. Mackey v. Bowles, 98 Ga. 730 (1896).

TRUSTS—SAVINGS BANKS—DEPOSITS—In Stockert v. Savings Bank, 139 N. Y. Suppl. 986 (1913), it was held that the giving of the bank book of a savings bank to the donee in connection with a deposit in the name of the donor as trustee for the donee, created an irrevocable trust, which was not revoked by the returning of the book at the request of the donor, in the absence of any evidence that the donor intended to revoke the trust and that the donee consented thereto.

This follows the rule as laid down in Matter of Totten, 179 N. Y. 112 (1904), *i. e.*, that if one person deposits money in his own name as trustee for another, a tentative trust is created, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book, or notice to the beneficiary. In all jurisdictions it seems to be well established that a deposit in trust for another is not conclusive upon the depositor, and that no trust is created when the declarations of the depositor and the surrounding circumstances show that such was not the intention. Kelley v. Snow, 185 Mass. 288 (1904); Barefield v. Rosell, 177 N. Y. 387 (1904); *in re* Hall, 154 Cal. 527 (1908); Rambo v. Pile, 220 Pa. St. 235 (1908).

In Massachusetts, notice to the *cestui que trust* during the lifetime of the depositor is required to be shown, Clark v. Clark, 108 Mass. 522 (1871); but the weight of authority is to the effect that such knowledge on the part of the beneficiary is not necessary either to create or evidence the existence of the trust. Martin v. Funk, 75 N. Y. 134 (1878); Milholland v. Whalen, 89 Md. 212 (1899); Merigan v. McGonigle, 205 Pa. St. 321 (1903).

Although these facts are sometimes construed, in connection with other facts, to show an intention not to create a trust, the retention of the bank book by the depositor, or the making of subsequent deposits and withdrawals, do not of themselves destroy the character of a trust of this nature, when it is once created and established, as it is consistent with the trust that these acts be done by the depositor as trustee. Sav. Bank v. Albee, 64 Vt. 571 (1892); Milholland v. Whalen, *supra;* Meislahn v. Meislahn, 56 N. Y. App. Div. 566 (1900); Bath Sav. Inst. v. Fogg., 101 Me. 188 (1906).